Supreme Court, U.S.
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No. 06-1044

In The

Supreme Court of the United States

JORGE FRANCHINI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

JORGE FRANCHINI
Petitioner Pro Se
Reg. No. 14087-424
Federal Prison Camp
P.O. Box 1085
Oxford, Wisconsin 53952

QUESTIONS PRESENTED

I. Whether an Inmate, who's Fifth Amendment due process rights have been breached when the district court imposed consecutive sentences upon him in violation of the then mandatory Federal Sentencing Guidelines can be barred from relief due to the statute of limitations governing the filing of an initial motion pursuant to 28 U.S.C. §2255.

II. Whether the Seventh Circuit Court of Appeals rendered a decision in conflict with decisions of this Court and of other Courts of Appeals, when it ruled that a Federal District Court was not required to decide on the substance of the Petitioner's argument which alleged that by sentencing him to consecutive terms of imprisonment for violation of 21 U.S.C. §843, even though he did not have a prior Federal drug conviction, violated the Petitioner's Fifth and Sixth Amendment rights as well as the United States Sentencing Guidelines which were then mandatory.

PARTIES

The Petitioner is Jorge Franchini, Reg. No. 14087-424, Federal Prison Camp, P.O. Box 1085, Oxford, Wisconsin 53952, Pro Se.

The Respondent is the United States of America represented by the Solicitor General, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001.

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DECISIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit is attached and a copy is hereto attached as Appendix A. The order of the United States District Court for the Northern District of Illinois is attached hereto as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on July 31, 2006, including an order denying a rehearing en banc. A copy of that order is attached hereto as Appendix B. Jurisdiction is conferred by 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Amendment V to the Constitution of the United States which in relevant part states:

> "No person . . . shall be deprived of life, liberty, or property, without due process of law. . . . "

This case also involves Amendment VI to the Constitution of the United States which in relevant part states:

> "In all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury . . . and to have the assistance of counsel for his defense."

STATEMENT OF THE CASE

On December 18, 2001, Jorge Franchini was arrested by Drug Enforcement on December 18, 2001. Jorge Franchini was arrested by Drug Enforcement Agents ("DEA") on a violation of 21 U.S.C. §846. The Defendant was released on a $100,000 secured bond.

On April 18, 2002, a Special Grand Jury for the Northern District of Illinois returned a 21-count indictment, Docket No. 01 CR 1138, that charged seven defendants with conspiring to distribute and with possession with the intent to distribute mixtures containing cocaine in violation of 21 U.S.C. §§841(a)(1), 846, and 18 U.S.C. §2. The defendants were also charged with using and causing to be used, a communications facility, namely a telephone, in committing and causing and facilitating the conspiracy to possess with intent to distribute cocaine in violation of 21 U.S.C. §843(b). Pursuant to a plea agreement, Franchini agreed to a plea involving two counts of violating 21 U.S.C. §843(b).

The plea agreement was governed, in part, by Federal Rule of Criminal Procedure 11(c)(1)(C). The parties agreed that the sentence imposed by the court shall include a term of imprisonment of 96 months. A judgment of guilty to counts 14 and 17 was entered and sentencing scheduled for September 12, 2003. (See attached Plea Agreement). Franchini was sentenced by this Court to 96 months in prison together with a term of supervised release.

ARGUMENT IN SUPPORT OF GRANTING CERTIORARI

A. Franchini's motion under §2255 was denied as having been filed over two years after his conviction became final and therefore was untimely.

Petitioner Franchini is both unlettered in the law and an unsophisticated son of Mexican immigrants. Although Franchini's attorneys spoke of the Defendant's consecutive sentences as judicial error, they did not advise the Defendant to file an appeal nor did they tell him about the need to file a §2255 motion within one year of his conviction becoming final. Franchini had no reason to doubt his attorneys until the *Blakely* and *Booker* decisions electrified the federal prison population. By that time, Franchini's time limit for filing had expired.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) established a one year limit on the filing of most federal habeas corpus petitions and all §2255 motions. These statutes of limitations apply to both initial and successive §2255 motions. See *Dodd v. United States,* 125 S.Ct. 2478, 2482-83 (2005).

The inmate must exercise due diligence in filing his §2255 motion. However, the question arises as to what the standard of due diligence is when the inmate is both unsophisticated and without competent legal advice.

Federal courts have employed the equitable tolling doctrine to create a grace period for inmates. "Equitable tolling is a background rule informs our construction of federal statutes of limitations".

In *United States v. Brockamp,* 519 U.S. 347 (1997), this Court concluded that the "statutory time limitations" of an Internal Revenue Code regulation could not be equitably tolled because (1) Congress did not intend equitable exceptions to be read into the statute; (2) there was no legislative intent to create equitable exceptions; and (3) the administrative problem equitable tolling would create suggests Congress would not have wanted to make an exception to the statute of limitations. The *Brockamp* decision suggests an analysis of the propriety of equitable tolling is situation specific.

The factors upon which the Court relied in *Brockamp* tend to militate in favor of equitable tolling of AEDPA's general one year limitations period for habeas corpus as well as §2255 motions. See, e.g., *Calderon v. United States District Court,* 128 F.3d at 1288. ([*Brockamp*] "is not to the contrary [of court's] conclusion that AEDPA's one-year limit could be equitably tolled"). None of the facts which militated against applying the doctrine of equitable tolling in *Brockamp* exist in Franchini's case.

This Court should be reluctant to deny Petitioner Franchini one clear and meaningful opportunity for post conviction review.

Indeed, in *Slack v. McDonald,* 529 U.S. 473 (2000), the majority expressly stated it was rejecting a restrictive interpretation of the Antiterrorism and Effective Death Penalty Act (AEDPA) proposed by the state because "[t]he writ of habeas corpus plays a vital role in protecting constitutional rights [and] ... Congress expressed no intention [in enacting the provision at issue] to allow trial court procedural error to bar vindication of substantial constitutional rights on appeal."

Although this Court has precluded certiorari review of a circuit court's denial of authorization to file a second or successive petition, this is a first motion pursuant to 28 U.S.C. §2255. See *Felker v. Turpin*, 518 U.S. 651 (1986). This was a successive petition case which presented the Court with its first opportunity to address the wording and implications of AEDPA. The Court concluded that the plain wording of the statute precludes certiorari review of a circuit court's denial of authorization to file a second or successive habeas corpus petition. Yet the Court went on to emphasize that a prisoner in such a situation retains the statutory right to file an original habeas corpus petition in the Supreme Court. ("We conclude that although the Act does impose new conditions on our authority to grant relief [on successive habeas corpus petitions], it does not deprive this Court of jurisdiction to grant relief [on original habeas corpus petitions]"); *id.* at 661 ("[t]he Act does not repeal our authority to entertain a petition for habeas corpus").

Subsequently, in *Castro v. United States*, 540 U.S. 375, 380 (2003), the Court unanimously limited the range of situations governed by the AEDPA provision at issue in *Felker v. Turpin*, rejecting the government's argument that this statutory provision barred the Court from considering whether the lower court had erred in treating a §2255 motion as a second rather than first motion of this type. See *Castro*, 540 U.S. at 380 ("In our view, however, th[e] [government's] argument stretches the words of the statute too far. . . . The subject of *Castro's* petition is not the Court of Appeals' denial of an authorization [to file a successive §2255 motion]. It is the lower court's refusal to recognize that this §2255 motion is his first, not his second. This is a very different question . . . Moreover,

reading the statute as the Government suggests would produce troublesome results. It would create procedural anomalies allowing review where the lower court decision disfavors, but denying review where it favors the Government. . . . It would close our doors to a class of habeas petitions seeking review without any clear indication that such was Congress' intent. . . . And any such conclusion would prove difficult to reconcile with the basic principle that we 'read limitations on our jurisdiction to review narrowly.'").

Franchini's dismissal at the district and appellate court levels ignored the exact nature and structure of his arguments. In *Dye v. Hofbauer*, U.S. 04-8384 (2005), this Court ruled that lower courts must look ac the substance of a defendant's pleadings and not merely the denial of the lower court.

In *Dye*, the defendant raised issues regarding prosecutorial misconduct in a Michigan state post conviction motion. Ultimately, the Sixth Circuit reviewed the defendant's pleadings and seized upon a perceived procedural irregularity in order to deny relief. The Sixth Circuit held that the defendant had failed to raise a federal constitutional error. In fact, the defendant had raised the constitutional issue in the district court. The importance of *Dye* is that courts are no longer free to ignore the merits of a claim simply because they have found some procedural reason to do so. Franchini's case, as did *Dye* in the Sixth Circuit, calls into question the §2255 practices of the Seventh Circuit when reviewing an initial §2255 claim.

Franchini's claim that he was wrongly sentenced to consecutive terms in violation of his due process rights is both plausible and legally supportable. Therefore, this

Court should grant certiorari to decide whether an inmate with such a claim should be barred due to the statute of limitations as defined by the AEDPA.

B. Because the Petitioner had no prior federal drug conviction, but only several state convictions, the district Court's doubling of Franchini's four year term of imprisonment on counts of using a communication facility to commit a drug trafficking felony was improper. Comprehensive Drug Abuse Prevention and Control Act of 1970, §403(b), (d)(1), 21 U.S.C. §843(b), (d)(1).

On December 18, 2001, Jorge Franchini was arrested by special agents of the Drug Enforcement Administration (DEA), pursuant to a criminal complaint filed in the Northern District of Illinois charging a violation of 21 U.S.C. §846 and §843. Franchini was released on $100,000 bond. Then, on April 18, 2002, a 23 count indictment charged Franchini and six defendants with conspiring to distribute cocaine in violation of 21 U.S.C. §§841(a)(1), 846 and 18 U.S.C. §2. Franchini was also charged with using a telephone in committing and facilitating the conspiracy to traffic in cocaine in violation of 21 U.S.C. §843(b).

On May 20, 2003, Franchini changed his plea to guilty of using a communication device in furtherance of a drug crime. The Petitioner's guideline level of 23 and criminal history category of VI carried a range of 92 to 115 months with a total statutory maximum of 48 months since none of Franchini's prior convictions were federal drug crime sentences. Franchini was sentenced to consecutive terms of 48 months for an incarceration period of 96 months.

The District Court improperly sentenced Franchini to consecutive terms of imprisonment for violating 21 U.S.C. §843(b). The repeat offender enhancement provided for under the statute governing the offense of knowingly using a communication facility with the intent to commit or facilitate the commission of conspiracy to distribute cocaine, or possession with the intent to distribute cocaine, applies only to prior drug felony convictions under federal law, and not to prior drug felony convictions under state law. *United States v. Cooper,* 316 F.Supp. 2d 919 (D.Colo. 2004).

Because the defendant had no prior federal drug convictions but only a state conviction, the District Court's doubling of his four year term of imprisonment on each count of using a communication device to commit a drug trafficking felony was improper. *United States v. Medley,* 313 F.3d 745 (2d Cir. 2002).

A criminal defendant is subject to an enhanced sentence only if he has been convicted of a drug felony under federal law. Thus, in Franchini's case, the plea agreement was inherently defective in that the Petitioner was not subject to consecutive sentences.

C. Franchini's counsel provided ineffective assistance in negotiating a plea agreement that subjected the Defendant to consecutive sentences for violation of 21 U.S.C. §843(b).

In *Strickland v. Washington,* 466 U.S. 668 (1984), this Court established the standard for evaluating claims of ineffective assistance of counsel. The defendant must show the following: (1) that counsel's assistance was unreasonable considering all the circumstances of the case; and (2)

that "there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.*, 104 S.Ct. at 2065, 2067. This standard applies to claims brought on direct appeal, in motions for a new trial, or in collateral proceedings.

The Petitioner's counsel's assistance was unreasonable in negotiating the plea agreement since 21 U.S.C. §843(b), applicable guidelines and case law make plain that Franchini could not be subjected to consecutive sentences unless he had a prior federal drug conviction. Franchini shows that this ineffective performance prejudiced him since the District Court sentenced him to 96 months imprisonment rather than the 48 month maximum. Without counsel's error, there is a reasonable probability that the Petitioner would have been sentenced to concurrent terms for the 48 month sentence.

In *Hill v. Lockhart,* 106 S.Ct. 366 (1985), this Court held that the *Strickland* standard described above applies to guilty plea challenges based on claims of ineffective assistance of counsel.

To be valid, a guilty plea must be knowlingly, intelligently, and voluntarily entered. The defendant must be shown to understand the nature of the charges and the consequences of his plea. In *Santobello v. New York,* 404 U.S. 257 (1991), this Court held that plea bargain agreements must be attended by safeguards to ensure the defendant what is reasonably due in the circumstances.

Because a guilty plea serves as a conviction and relieves the Government of its burden of proof, ensuring the validity of the plea is of vital importance. It is unreasonable to assume that had Franchini known that he was not subjected to consecutive terms of 48 months under

§843(b), he would have plead to the increased sentence. This is purely a case of Defendant's counsel not providing adequate assistance.

CONCLUSION

Due to the egregious violation of Petitioner Jorge Franchini's Fifth Amendment right to due process and his Sixth Amendment rights to both a jury trial and effective assistance of counsel, this Court should grant him certiorari.

Respectfully submitted,

JORGE FRANCHINI
Petitioner Pro Se
Reg. No. 14087-424
Federal Prison Camp
P.O. Box 1085
Oxford, WI 53952

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Submitted May 26, 2006
Decided May 31, 2006

Before

Hon. ILANA DIAMOND ROVNER, *Circuit Judge*

Hon. ANN CLAIRE WILLIAMS, *Circuit Judge*

No. 06-1940

JORGE FRANCHINI, *Petitioner-Appellant*, *v.* UNITED STATES OF AMERICA, *Respondent-Appellee.*	Appeal from the United States District Court for the Northern District of Illinois No. 06 C 20 Amy J. St. Eve, *Judge*.

ORDER

Jorge Franchini has filed a notice of appeal from the denial of his motion under 28 U.S.C. § 2255 and an application for a certificate of appealability. This court has reviewed the final order of the district court and the record on appeal. We find no substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

Accordingly, the request for a certificate of appealability is DENIED.

United States District Court
Northern District of Illinois
Eastern Division

USA, **JUDGMENT IN A CIVIL CASE**

v. Case Number: 06 C 20

Franchini, (Filed January 4, 2006)

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

■ Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that Jorge Franchini's motion to vacate, set aside or correct this sentence pursuant to 28 U.S.C. Section 2255 is denied as untimely.

Michael W. Dobbins, Clerk of Court

Date: 1/4/2006 /s/ Theresa Hammonds,
Deputy Clerk

DOCKET ENTRY TEXT
Jorge Franchini's motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255 is denied as untimely. ■ [For further details see text below.] Docketing to mail notices.

STATEMENT

Before the Court is Jorge Franchini's motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. A motion made pursuant to Section 2255 is subject to a one-year period of limitation. *Robinson v. United States*, 416 F.3d 645, 647 (7th Cir. 2005). The year usually runs from the date on which the conviction becomes final. *See id.* Section 2255 provides that the limitation period can be triggered by other dates, as well. *See* Section 2255, ¶ 6. Here, Franchini contends that his Section 2255 motion is timely because it has been less than one year from the date on which the facts supporting his ineffective assistance of counsel claims could have been discovered through the exercise of due diligence. *See* Section 2255, ¶ 6(4).

Consulting his *pro se* Section 2255 motion liberally, *see United States v. Ogle*, 425 F.3d 471, 475 (7th Cir. 2005), Franchini claims that he did not discover the basis of his assistance of counsel claims until over two years after his conviction became final. Franchini, however, does not explain how or why he did not know the basis of his ineffective assistance of counsel claims until recently. Indeed, the Court finds his argument implausible, especially because the facts underlying his Section 2255 claims pertain to his sentence which he has known about since September 12, 2003. In other words, Franchini knew of the factual predicate to his ineffective assistance of counsel claims since the Court sentenced him on September 12, 2003. *See Daniels v. Uchtman*, 421 F.3d 490, 492 (7th Cir. 2005)

Thus, the Court turns to when Franchini's conviction became final to determine if his Section 2255 motion is timely. *See Robinson*, 416 F.3d at 647. Using the finality of his conviction as the trigger for the limitations period, the one-year period expired on September 26, 2004, ten days after the Court sentenced Franchini to ninety-six months' incarceration on September 12, 2003 because Franchini did not appeal the judgment of conviction. *See* Fed. R. App. P. 4(b)(1)(A)(i). Accordingly, because Franchini filed the present Section 2255 motion on January 3, 3006 – well after the one year statute of limitations had expired – the Court dismisses his motion as untimely.

United States Court of Appeals
for the Seventh Circuit
Chicago, Illinois 60604

April 24, 2006

By the Court:

JORGE FRANCHINI, Petitioner-Appellant, No. 06-1940 v. UNITED STATES OF AMERICA, Respondent-Appellee.	]]]]]]]]	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 06 C 20 Amy J. St. Eve, Judge.

ORDER

ON consideration of the "JURISDICTIONAL MEMORANDUM" filed by appellee on April 19, 2006,

IT IS ORDERED that this appeal shall proceed to a determination of appellant's fee status on appeal, and to a determination whether a certificate of appealability should issue.

Briefing in this appeal is SUSPENDED until further court order.

United States Court of Appeals
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

July 31, 2006

Before

Honorable ILANA DIAMOND ROVNER, *Circuit Judge*

Honorable ANN CLAIRE WILLIAMS, *Circuit Judge*

JORGE FRANCHINI, *Petitioner-Appellant,* No. 06-1940 *v.* UNITED STATES OF AMERICA, *Respondent-Appellee.*	]]]]]]]]	Appeal from the United States District Court for the Northern District of Illinois. No. 06 C 20 Amy J. St. Eve, *Judge.*

ORDER

No judge of the court having called for a vote on the Petition for Rehearing En Banc filed by Petitioner-Appellant on June 16, 2006, and both of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the Petition for Rehearing En Banc is DENIED.